S. HRG. 98-1161

THE FREE MARKET COPYRIGHT ROYALTY ACT OF 1983

HEARING

BEFORE THE

SUBCOMMITTEE ON
PATENTS, COPYRIGHTS AND TRADEMARKS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

SECOND SESSION

ON

S. 1270

A BILL TO AMEND TITLE 17, UNITED STATES CODE, REGARDING THE COPYRIGHT ROYALTY TRIBUNAL

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THE FREE MARKET COPYRIGHT ROYALTY ACT OF 1983

TUESDAY, MARCH 13, 1984

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS,
Washington, DC.

The subcommittee met, at 10:05 a.m., in room 226, Dirksen Senate Office Building, Senator Dennis DeConcini (member of the subcommittee) presiding.

Ralph Oman, chief counsel; Thomas P. Olson, counsel; Ellen Broadman, minority chief counsel (Subcommittee on Patents, Copyrights and Trademarks); Renn M. Patch, counsel; Edward H. Baxter, minority counsel; Yvonne Hunter, minority staff assistant (Subcommittee on the Constitution); and Scott H. Green, minority professional staff member (Subcommittee on Criminal Law).

OPENING STATEMENT OF SENATOR DENNIS DeCONCINI

Senator DECONCINI. The Senate Judiciary Committee on Patents will come to order.

Serving as chairman today, myself, thanks to Chairman Mathias for scheduling these hearings on S. 1270. I hope we will be able to have a second day of hearings on this legislation in the near future.

I am pleased that the committee saw fit to establish in the 96th Congress the new Subcommittee on Patents, Copyrights and Trademarks. I look forward to exploring with the members of the committee many issues, particularly how best we can use and protect the intellectual property in this era of expanding technology. Cable television will be one of the most interesting technologies, the impact of which we will be examining.

Senator Hatch and I introduced the Free Market Copyright Royalty Act to bring equity in the relationship between copyright holders and one group of users of copyright material. S. 1270 is designed to provide a free market alternative to an artificial governmental-imposed relationship between parties and imposed decisionmakers at the Copyright Royalty Tribunal. When Congress created the tribunal, it was our hope that this agency would serve, among other functions, as an effective and fair referee in a legally and economically complex area, the determination adjustment and distribution of royalty rates for the retransmission of over-the-air broadcast signals. The CRT was charged by Congress in 1976 to adjust the royalty rate set by statute for the retransmission of distant nonnetwork television programs under a compulsory license if certain rules and regulations of the Federal Communications Com-

mission, were changed. When such adjustments became necessary, as it did in 1981, Congress expected that the CRT would balance the interest of copyright holders in receiving a fair return for their creative work against the interest of the copyright user in receiving a fair income from such use while considering the public interest in access to such copyright material.

In at least one area addressed by the CRT rates, adjustment decision, I believe that the CRT has erred in its balanced responsibility because I believe that the CRT's error was caused, at least in part, by Congress' failure to provide for adequate personnel staff, particularly lawyers and economists. I have included provisions in my legislation which reform the basic structure of the CRT.

On November 19, 1982, the CRT issued a decision which increased the amount the cable system must pay for carriage of the signals of any distant broadcast station that it was not permitted to carry under FCC rules in effect as of June 24, 1981. Parties who believed themselves aggrieved by this transaction were able to get its effect delayed by Congress until March 15, 1983. I resisted the effort in Congress to stay the CRT decision because I support the general principle that copyright holders are entitled to just compensation for use of their creative works. I was not then and am not now persuaded that the CRT's decision does not represent a proper balance of the economic interests involved in the dispute. I am convinced, however, that the CRT erred in not allowing the free market to work to determine compensation in the one area that it is already doing so.

If a broadcast television station has become a national cable broadcast network with a sufficiently large national audience and advertiser base to require payment of equitable copyright licenses' fee to program suppliers in direct marketplace negotiations, then the CRT and Congress should recognize and sanction such negotiations. The presence of such direct licensing practices, there is no need for the supplementary free fee imposed by the CRT. Moreover, program suppliers will receive a windfall if, in addition to the marketplace license fee, they receive a second large payment based on the CRT's increased royalty rate.

The effect of the CRT decision has been to deny access to one or more different broadcast stations to millions of Americans. While I reiterate my belief in fair compensation, I believe that the mechanism must be found to ensure just compensation while maximizing public access to the creative work.

I have been disturbed by the literature put out by a very interested party in this dispute trumpeting the CRT's decision as a great victory because it will lessen competition for its members. I believe the Subcommittee on Patents, Copyrights and Trademarks should closely examine the anticompetitive effects of the CRT decision and the statute upon which it is based.

[A copy of S. 1270 follows:]

II

98TH CONGRESS
1ST SESSION

S. 1270

To amend title 17, United States Code, regarding the Copyright Royalty Tribunal.

IN THE SENATE OF THE UNITED STATES

MAY 12 (legislative day, MAY 9), 1983

Mr. DECONCINI (for himself and Mr. HATCH) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend title 17, United States Code, regarding the Copyright Royalty Tribunal.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Free Market Copyright Royalty Act of 1983".

FINDINGS

SEC. 2. The Congress hereby finds that—

(1) in order to promote the availability and diversity of nationally distributed television programing for the public, national cable broadcast networks are

needed that will provide to cable subscribers a full range of news, information, sports, and entertainment services; and

(2) the Copyright Royalty Tribunal lacks adequate professional staff to perform effectively its statutory functions.

DISTANT SIGNAL ROYALTIES

SEC. 3. Section 801(b)(2) of title 17, United States Code, is amended by—

(1) striking out "; and" in subparagraph (D) and inserting in lieu thereof a period; and

(2) inserting at the end thereof the following new subparagraph:

"(E)(i) Notwithstanding the provisions of subparagraph (B), the Tribunal shall exempt from any adjustments in copyright royalty rates made pursuant to this subsection the carriage by any cable system (including functional equivalents thereof), as defined in section 111(f) of this title, of any national cable broadcast network signal. Carriage of a national cable broadcast network signal pursuant to such exemption shall be subject solely to the royalty rate provisions of section 111(d)(2)(B), as adjusted in accordance with section 801(b)(2)(A), and shall not count against the

complement of signals referred to in clauses (i) and (ii) of subparagraph (B). For purposes of this subsection, the term 'national cable broadcast network' means a television broadcast station that has been classified as such by the Tribunal. The Tribunal shall so classify any television broadcast station that requests such classification upon the certification by the station that—

"(I) the station's signal is distributed nationally for carriage by cable systems and the station promotes such carriage;

"(II) the station's commercial practices and rates seek to compensate the station for its national audience;

"(III) the station's share of the national viewing audience is measured regularly by the major national rating measurement services; and

"(IV) copyright owners who supply works for performance or display over the station are aware of the national distribution of the station's signal.

"(ii) The Tribunal shall issue, within thirty days after its receipt of such certification, its classification of the station as a national cable broad-

cast network if it finds that the certification meets the standards set forth in this section. The decision of the Copyright Royalty Tribunal to deny classification as a national cable broadcast network shall be reviewable de novo in Federal district court; and".

MEMBERSHIP OF THE TRIBUNAL

SEC. 4. (a) Upon expiration of the terms of office of the three commissioners of the Copyright Royalty Tribunal whose terms expire on September 27, 1984, no person shall be appointed to fill either of two of such offices after such date. Such two offices shall be abolished effective on September 28, 1984.

(b) Effective on the date on which the offices of two Tribunal commissioners are abolished pursuant to subsection (a) of this section, section 802(a) of title 17, United States Code, shall be amended by striking out "five" the first place it appears in the first clause and inserting in lieu thereof "three".

STAFF OF THE TRIBUNAL

SEC. 5. (a) Section 805 of title 17, United States Code, is amended by adding at the end thereof a new subsection as follows:

"(c) The Tribunal shall appoint, and fix appropriate compensation for a general counsel and a chief economist to

carry out the functions customarily performed by persons with such titles.".

(b) The appointments mandated by section 805(c) of title 17, United States Code, as added by subsection (a) of this section shall commence no earlier than the date on which the membership of the Tribunal is reduced from five commissioners to three commissioners, pursuant to section 4 of this Act.

Senator DECONCINI. Our witnesses today are three. Our first witness will be Mr. Turner, president of the Turner Broadcasting Co.

Mr. Turner, if you would come forward, please. If you want counsel or somebody with you, that is fine. Your full statement will be presented in the record, Mr. Turner. You may proceed with a summary of same.

STATEMENT OF R.E. TURNER III, CHAIRMAN OF THE BOARD AND PRESIDENT OF TURNER BROADCASTING SYSTEM, INC.

Mr. TURNER. All right, sir, I will start.

Mr. Chairman and members of the subcommittee, I appreciate this opportunity to testify on cable copyright and the public impact of the recent CRT rate decision.

As you know, the Copyright Act of 1976 established a compulsory license system authorizing the retransmission of distant broadcast television signals by cable television systems. In return, cable systems pay copyright royalty fees which are distributed annually by the Government to the program owners. This fund exceeded $40 million in 1982.

The purpose of this system is simply explained. It provides compensation to copyright owners for cable's incremental use of broadcast programming, while furthering the public interest in the availability of such programming.

The balance of interests established in the act has been destroyed by the CRT's 1982 fee increase, however. Under that decision, cable television systems that carry more than a minimal complement of distant broadcast signals must pay 3.75 percent of gross revenues in royalty fees; a rate some 400 to 1,600 percent higher than the statutory rates established by Congress in the Copyright Act.

Intending to compensate program owners for the additional use of their property resulting from the FCC's deregulation of cable in 1981, the CRT failed to account adequately for the interests of the user and the public. According to a 1983 NCTA study, the CRT decision has denied over 10 million American cable homes access to one or more signals that they had been receiving.

More important, however, the CRT totally failed to acknowledge changing technological and economic factors that undercut its decision. Specifically, it failed to recognize that the program market has not remained static since the enactment of the 1976 act. To the contrary, a "distant signal marketplace" has developed in which program owners may receive additional direct compensation from some broadcasters carried on cable, obviating the need for additional cable operator royalty payments.

Turner Broadcasting System, Inc., is licensee of television station WTBS, channel 17, Atlanta, better known as the SuperStation. Through the integration of three different technologies—broadcast, satellite, and cable—the signal of WTBS has been distributed nationally to cable subscribers since 1976. Satellite and cable retransmission of the WTBS signal accounts for over 25 cents of every dollar paid in copyright fees by cable systems to copyright owners.

These royalty payments are not the limit of the programmers' compensation, however. With the growth of the cable industry, the

SuperStation has evolved into a hybrid "National Cable Broadcast Network."

Although WTBS cannot control its distribution over cable under the compulsory license, it nevertheless can sell the national cable audience the results from cable retransmission to national advertisers. The increased advertising revenues WTBS thus earns from an expanded audience base is used to create or acquire programming in the national program marketplace.

These revenues are passed through to copyright owners in the form of increased direct licensing fees. As the following table indicates, these fees have increased dramatically with the increase in the SuperStation's national cable audience upon the renewal of program contracts.

PACKAGE RENEWALS

Distributor	Package	Date of contract	BDate	EDate	Titles	Runs	Cost	Distant cable households
CB Distributors	Carol Burnett	Feb. 13, 1981	Apr. 1, 1982	Sept. 30, 1986	150	6	$1,800,000	10,960,600
	Do	Oct. 13, 1977	Oct. 1, 1978	Mar. 31, 1982	120	6	720,000	1,150,822
Columbia	Father Knows Best	May 8, 1981	Jan. 1, 1983	Dec. 31, 1990	191	10	382,000	12,103,977
	Do	Jan. 11, 1977	Jan. 1, 1977	Dec. 31, 1982	191	4	57,300	563,421
	Do	Aug. 9, 1973	Sept. 1, 1973	Aug. 31, 1978	191	3	19,100	0
	Three Stooges	Apr. 30, 1981	May 1, 1982	Dec. 31, 1987	190	unl	270,570	11,758,391
	Do	Mar. 21, 1978	May 1, 1978	Apr. 31, 1982	190	unl	38,000	1,790,718
	Do	May 24, 1973	Mar. 1, 1973	Apr. 30, 1978	190	unl	19,000	0
Filmways	Green Acres	May 4, 1981	June 5, 1983	June 30, 1991	170	unl	510,000	12,103,977
	Do	Aug. 1, 1975	Dec. 20, 1977	June 4, 1983	170	5	34,000	0
King World	Little Rascals	Mar. 26, 1981	Sept. 16, 1986	Sept. 15, 2000		unl	700,000	11,488,785
	Do	July 13, 1978	Sept. 16, 1980	Sept. 15, 1986		unl	80,000	2,482,649
	Do	June 30, 1977	Sept. 16, 1977	Sept. 15, 1980		unl	24,000	978,396
MCA	Leave It To Beaver	Feb. 13, 1981	Aug. 31, 1981	Aug. 30, 1989	234	7	936,000	10,960,641
	Do	May 6, 1974	Jan. 1, 1975	Dec. 31, 1980	234	3	23,400	0
P.I.T.S. Films	Sanford & Son	Mar. 20, 1981	Sept. 1, 1983	Aug. 31, 1989	136	6	2,244,000	11,236,940
	Do	Oct. 18, 1977	Sept. 11, 1978	Sept. 10, 1983	136	6	1,088,000	1,161,886
20th Century Fox.	Lost In Space	Mar. 13, 1980	Sept. 1, 1980	Aug. 30, 1986	83	6	224,100	7,458,146
	Do	May 5, 1975	Nov. 1, 1975	Nov. 1, 1980	83	4	33,200	0
Viacom	Hogan's Heroes	Apr. 18, 1978	Sept. 1, 1981	Aug. 31, 1987	168	6	588,000	1,985,184
	Do	Apr. 23, 1973	Sept. 1, 1973	Aug. 31, 1981	168	6	151,200	0
	I Love Lucy	Apr. 18, 1978	Sept. 1, 1981	Aug. 31, 1987	179	6	358,000	1,985,184
	Do	Jan. 7, 1974	Sept. 1, 1974	Aug. 31, 1981	179	10	62,650	0

Mr. TURNER. Most significant, the SuperStation's program transactions have occurred in a totally free marketplace that has evolved on top of the compulsory license system. That is, copyright owners know that WTBS is nationally distributed by satellite and cable, and indeed that WTBS promotes such carriage.

Each transaction in this market has been voluntary. There are a number of television stations in Atlanta, eight others in fact. No program owner is compelled, therefore, to sell programming to WTBS. In fact, a number of programmers have refused to deal with us since 1976. The market is competitive.

Other programmers willingly sell to us, but discriminate between recent off-net programming, like "MASH" or "Three's Company," which is sold only in conventional syndication, and older programming, which is not so much in demand in the broadcast market nationally, which is sold to us. The SuperStation clearly represents an emerging syndication submarket.

Finally, the price for this programming has been established in free marketplace negotiations in which one can presume the owner is competent to judge both the value and cost of SuperStation carriage. Indeed, information critical to that determination, WTBS' advertising rate card, our advertising revenues, and data as to audience viewing of the SuperStation is compiled by Nielsen and Arbitron, and is readily available. Any owner concerned that returns from SuperStation carriage is unfair or noncompensatory may simply refuse to deal.

For the others, however, the SuperStation has evolved into a network middleman for the cable distribution of their programming. It was the absence of such middlemen that, you will recall, Congress relied on in originally justifying the compulsory license in the 1976 Copyright Act.

Where, as is now the case, free market negotiations establishing the price, terms, and conditions of exhibition have evolved between the SuperStation and the owner, there is no need for government regulation to set prices. Imposition of the secondary, 3.75-percent copyright fee increase of the CRT here acts solely as a windfall to copyright owners.

Most important, the CRT's decision has a negative impact on the continuing evolution of the SuperStation marketplace. Its excessive fee increase acts as a disincentive to the carriage of SuperStation signals on cable.

Where systems have dropped these signals, or refuse to add them because of these high fees, gaps are created in the national coverage of such networks. This will reduce their advertising revenues, will restrict their amortization of program costs, and will reduce their direct program payments to copyright owners. This frustrates the evolution from a compulsory license system for distant signals to a fully licensed system.

Senator DeConcini, your bill, S. 1270, would correct this deficiency of the CRT's decision. It would direct the CRT to exempt cable systems from its special 1982 fee increase for the carriage of "National Cable Broadcast Networks"—those distant signals that have evolved or wish to evolve to pay copyright holders directly for the national cable TV audience.

The bill does not exempt any station directly. It merely establishes policy and provides essential standards and guidelines to the CRT. The CRT is directed to implement that policy under the guidelines provided.

Further, the standards in the bill are generic. Designed to determine the presence of a workably competitive SuperStation market, any station promoting its national distribution and compensating copyright owners for the resulting national cable audience in freely negotiated contracts could apply for an exemption.

Finally, S. 1270 would also improve the CRT's performance in the future by providing for the appointment of expert legal and economic staff to assist the CRT in the performance of its difficult tasks. These positions would be funded by the savings realized from reducing the number of Commissioners on the CRT from five to three. I understand that this proposal is fully consistent with prior recommendations of the General Accounting Office and has not been opposed by the CRT itself.

Thank you for your consideration. I would be pleased to answer any questions you may have.

Senator DECONCINI. Mr. Turner, thank you for the thorough statement.

Let me first clarify what we mean by asking you to give us a few definitions. What exactly is a so-called SuperStation? Can you give us that in layman's terms?

Mr. TURNER. Well, I came up with the idea for the term and tried to copyright it. But like Kleenex, it had become pretty generic already by then, and we were not successful in copyrighting it. A superstation is a broadcast station whose signal is relayed by satellite to cable systems throughout the Nation.

Before we were on the satellite, we were watched by a number of cable systems in and surrounding the Atlanta marketplace, but we were having difficulty in reaching markets like Mobile, AL, and Savannah, GA, that couldn't be reached at reasonable cost by terrestrial microwave relay systems. When I first read about the satellite, communication satellites that were being put into orbit, I thought this would be a good way, which was totally legal, to reach an expanded cable TV audience. When the FCC deregulated cable under FCC Commissioner Ferris, the FCC gave those stations that wished to do so a mandate to go out and try to compete with NBC, CBS, and ABC over cable. I said this is America, it is an opportunity to try and create a fourth national television network using cable TV. This was against the basic interests of the broadcast industry which has opposed cable for a number of years.

Senator DECONCINI. Does the compulsory license system apply at all?

Mr. TURNER. Yes, sir; it did. The compulsory licensing system was already being discussed. I forget the exact time that the cable industry agreed with the copyright holders on the compulsory license idea. It was a compromise agreement. It was not mandated by the Government. When that rule was put into effect, it opened up an opportunity for the first time for a potential fourth network. We have operated ever since under the Government's rules and the rules as they were set up to attempt to create a fourth network. We are very close to creating the fourth network. We are in 35 per-

cent of the television homes in the country and have the highest viewership of any other cable network at the current time. We do not want to be blocked from further growth by the CRT decision which denies us access to approximately 20 percent of the cable homes in the country.

Senator DECONCINI. Thank you.

The bill before us, known as the Free Market Copyright Royalty Act, is designed to encourage more direct marketplace negotiations between broadcasters and copyrightholders over the broadcast rights to television programs. S. 1270 sets out four criteria, as I am sure you know, which a TV station could meet in order to be classified as a national cable broadcast network.

Would you explain for the record the four criteria described in the bill and how you believe they would be used to classify a superstation as a national cable broadcast network?

Mr. TURNER. OK, I will do my best to try to remember the four criteria.

The first criterion is that the broadcast station be delivered and promoted as a national program service nationwide. Second, that its commercial practices capitalize on its nationwide cable audience. Third, that its audience is measured by a rating service, such as Arbitron and Neilsen, and fourth, that the copyrightholders have full knowledge of these practices so that they can demand commensurate compensation. Those are the four standards that are in the bill.

Senator DECONCINI. And how do you believe they would be used to classify a superstation as a national cable broadcast network?

Mr. TURNER. Those four things completely and accurately describe what we are doing.

Senator DECONCINI. If your station were to qualify as a national cable broadcast network under 1270, cable systems which carry it would be exempt from the traumatic long-distance signal royalty increase announced by the Copyright Royalty Tribunal in October which went into effect 1 year ago.

How did it affect WTBS?

Mr. TURNER. Well, we lost approximately, I think, part time and full time, close to half a million homes, close to 1 percent of the total homes in the United States. Additionally, the larger systems in the Northeast, in California, and in the Midwest around the Chicago market have been precluded from adding us as they probably would have.

This bill does not force a cable system to add us. It just gives them the opportunity to do so at an affordable rate.

Senator DECONCINI. Who will really benefit in your judgment from S. 1270 besides WTBS?

Mr. TURNER. Virtually everyone. First of all, the public will benefit. We will be stronger as time goes on and be able to do a better programming job and do more original programming because we will be able to amortize programming costs over the total cable audience. The program suppliers in Hollywood that we buy programming from will be benefited because our revenues will go up and we will be able to pay them more money. The American people will benefit from the creation and building up of a fourth network. Virtually everyone will benefit. There has been a great amount of ben-

efit to all those various groups already. Finally, the cable industry will benefit as well because it will have better programming.

Senator DECONCINI. Obviously. You would still have to go to the same source for your programs.

Mr. TURNER. Well, we get our programming from a number of sources now. But, sure, we plan to continue to buy programming from those sources in the future.

Senator DECONCINI. You would deal with those sources?

Is it your point that if you qualified here under S. 1270 you would have a greater audience and pay more if necessary to get the programming?

Mr. TURNER. Absolutely. We have been doing that as we evolved. As our viewership has gone up, the price we pay for programming has gone up commensurately.

Senator DECONCINI. I believe that it is widely acknowledged that at the present time WTBS would be the only station which might qualify as a national cable broadcast network under S. 1270. The bill itself exempts no one.

Would you apply for such classification?

Mr. TURNER. Absolutely, sir.

Senator DECONCINI. And do you anticipate that any other stations might also apply?

Mr. TURNER. Well, WGN and WOR, which are also on satellite and have wide coverage, could apply, if they wished to do so. One of those stations is located in the Chicago market and the other in the New York market, which are very large television markets. In the past they have chosen not to do so because they did not want to take the risk, as we did, to go into competition or attempt to go into competition with CBS, NBC, and ABC. But they could always do it at any time in the future, and so could any other station that wished to do so. WPIX in New York is also going to be going on satellite fairly soon, and they could do it also if they wished to do so.

Senator DECONCINI. It is a burgeoning area of the broadcast industry.

Mr. TURNER. Yes, sir.

Senator DECONCINI. There are a number of potentials.

Do you think that other superstations attempt to compensate program owners for their national cable audience as well as for their local audiences?

Mr. TURNER. In this business, it is historially the case that you try and pay as little for programming as you possibly can, and then you sell the advertising for as much as you possibly can. That is basic to the way the business operates. And I know for a fact that both WGN and WOR, particularly in their baseball telecasts, are getting more money from the advertisers for their cable audience, because the advertisers have told me so, even though they do not tell the station that. The advertisers try and buy as cheaply as they possibly can, too.

So you have people that basically would like to buy as inexpensively as possible and sell for as much as possible. That is the way the television business works.

Senator DECONCINI. Would not S. 1270 bring some amount of equity to that situation?

Mr. TURNER. Yes, sir, it would.

Senator DECONCINI. Just let me ask a couple more general questions.

S. 1270 would apply the exemption from the recent royalty rate increase to the functional equivalent of cable television.

Would you tell us what this means and whether you would favor the expansion of the compulsory license system to these functional equivalents.

Mr. TURNER. Yes, sir.

Right now there are a number of people in this country that live in remote geographic areas where the homes are too far apart to wire economically for cable, farmers and people who live up in the mountains and so forth. There are also some cities, Washington, DC, being one, that have not as yet granted cable franchises. And I guess it is possible that there might be some cities that would never grant cable franchises.

Under the current situation, that means that those people who did not have cable available to them do not have alternate television available to the three networks. With direct broadcast satellite, multichannel MOS, and private cable systems, you can pick up these satellite signals if you invest in an Earth station that has been deregulated. It would allow these other functional equivalents of cable to offer the same type of programming that cable could offer to the people who do not have cable available. They would have to pay the same copyright fees that cable does. So it would just make our programming available to people that do not have cable available.

Senator DECONCINI. Critics of superstations often say that they fragment audiences for local independent TV stations, reducing the station's revenue and program licensing fees.

How would you answer this criticism?

Mr. TURNER. Well, in a competitive world which, hopefully, the television business is finally becoming, every signal fragments the audience to some extent. But the people that have the lion's share of the audience, some 70 percent of it, are the three networks. If the local independent stations want to have somebody put out of business so their audience is larger, they should lobby here in Congress to have the networks broken up because that is where the real audience is.

Senator DECONCINI. Not to be too general, but is it a fair assumption that independent stations are doing well?

Mr. TURNER. Yes, sir. The whole television business is doing incredibly well.

The competition from cable television in these alternate networks that have come on the scene have not hurt the existing TV industry. Actually, cable has helped broadcast TV, particularly the independent UHF station, because it gives them signal parity with VHF stations in the local market. The television business has never done better than it is doing at the current time. All segments of the business are booming.

Senator DECONCINI. Thank you, Mr. Turner. I have no further questions. Thank you for your fine statement and answering the questions.

Mr. TURNER. Thank you, sir.

Senator DECONCINI. Our next witness is Stephen Effros, executive director, Community Antenna Television Association.

Good morning. Thank you for being with us today.

STATEMENT OF STEPHEN R. EFFROS, EXECUTIVE DIRECTOR, COMMUNITY ANTENNA TELEVISION ASSOCIATION

Mr. EFFROS. Thank you for inviting me.

I would like to start by thanking you for the opportunity to appear before you today.

As you well know, the entire area of copyright as it affects cable television is subject to a great deal of confusion. CATA has been known over the years for its representation of the nonmajor urban market cable operators—and with regard to those operations, our ability to simplify the copyright morass dramatically. In essence, we never thought that cable operators should have had to pay copyright fees for the carriage of broadcast signals in the first place.

But that is water over the dam. CATA's members are paying copyright, and we now find ourselves in the uncomfortable position of having to pay fees for signals that others get without penalty, pay fees for signals not in fact seen by our subscribers, and pay for signals that copyright owners have already received a fee from for our carriage. We are here to address some of those problems.

In discussion with the committee staff, I was invited to testify today not only on the bill directly before you, S. 1270, but also on developments which hopefully will lead to the introduction of a companion bill dealing with similar issues. Let us start with S. 1270.

The Community Antenna Television Association fully supports the passage of S. 1270. It is one part of a multifaceted attempt to correct the inequities brought about by the imposition by the Copyright Royalty Tribunal [CRT] of the 3.75-percent penalty fee on the carriage of imported distant television signals.

There are two main difficulties we hope to address by the legislation we are seeking. First, cable operators should not have to pay copyright penalty fees for the carriage of television broadcast signals if those signals have already been paid for in the open marketplace. Second, regardless of whether the new penalty rates are correct or not—and, of course, we do not think they are correct—they should be applied uniformly across the board. Some American citizens should not be forced to pay for programming that others get without penalty simply by the accident of their location.

S. 1270 deals with the first aspect. There is no mystery surrounding the fact that certain "local" television stations are now transmitted by satellite to cable systems throughout the United States. There is also no secret that one of those stations, owned by Mr. Turner's organization, has actively promoted the carriage of his station nationwide. All you have to do is look at the newsweeklies or recent beverage ads to know that. The copyright holders know it as well. They have willingly negotiated new contracts with WTBS, at higher rates, reflecting the fact that they realize that the programming is being seen beyond the borders of the Atlanta market.

The copyright law ignores this new marketplace practice. To be sure, Mr. Turner and WTBS have altered what used to be considered the marketplace with regard to signal delivery. But that should be of no concern to this panel so long as the marketplace has adjusted to the new reality. And it has. The problem is that the fees imposed by the copyright law on cable operators do not reflect that reality. Thus, the copyright owner gets paid twice for the carriage of the same signal. This is what S. 1270 attempts to address.

Until now, the fees have not acted as a significant deterrence to the carriage of distant television signals. However, with the CRT's most recent 3.75-percent penalty fee imposition, all that has changed. The fees do not reflect a realistic price for the carriage of distant signals—at least not from the cable operator's perspective. Now, we need not debate that here. There is no suggestion right now that we alter that fee. What we are suggesting is that changes must be made in the application of the fee. Because it is so high, the result has been that systems have been deleting service to subscribers nationwide. The American viewing public is being denied diversity instead of being the beneficiary of additional diversity as is the intent of the copyright law.

With regard to S. 1270, we are aware that some would argue that the bill is really so-called special interest legislation since the supposed main beneficiary is Mr. Turner and WTBS. This is simply not true. The main beneficiary is the cable-subscribing public, and here is why. Turner Broadcasting's WTBS is already viewable in approximately 82 percent of all cable homes. That means that if this bill passes, and WTBS is considered a national cable broadcast network according to the dictates of the statute, cable operators would be allowed to carry that signal on their systems without having to pay any penalties for such carriage. Since the penalties are imposed based on the number of signals carried, it would mean that the operator could add another distant signal to his carriage complement without incurring unreasonable charges. This would, of course, inure directly to the benefit of the subscribers in getting another signal.

In 82 percent of the cable subscriber homes in the United States, it would mean that the operator could import a distant television station other than WTBS. In only 18 percent of the homes would there be a potential benefit for WTBS where they could be added to the signal carriage complement without the operator having to pay penalty fees. You may hear some folks argue that this bill is a special interest bill for Ted Turner. I am showing you the numbers that prove that it is of far greater interest to the American cable-subscribing public. CATA fully supports S. 1270.

By way of keeping you informed of potential future events in this area, I would also like to take this opportunity to update you on the progress of some cable/copyright legislation that has already been introduced in the House of Representatives, H.R. 2902, introduced by Representative Synar of Oklahoma. We are hopeful that if current negotiations prove successful, a similar bill will be submitted for your scrutiny shortly. Once again, the bill does not deal with the highly emotional issues surrounding the basis for copyright payments by cable operators, or even the amount of the penalty fees that are now being imposed on us. It is simply legislation

that says whether the impositions are right or wrong, at the very least they should be applied equally.

The current situation is that the CRT, in reacting to the elimination by the FCC of its distant signal importation restrictions, set a new, very high fee for the additional distant signals allowed to be imported following the elimination of the Commission's rules. That, by itself, we are not arguing with, at least not now. However, in the process of imposing those new fees, the CRT chose to simply track the old FCC rules. The result was, in essence, the reimposition of those rules through economic means. The trouble with doing things that way is that the old FCC rules had nothing to do with copyright. They were protectionist rules for broadcasters which were ultimately found to be unnecessary. Reimposing them economically through the copyright mechanism has resulted in a gross distortion in the rights of some American cable viewers.

Put simply, why should the folks in the smaller, more rural areas have to pay more for the identical programming that can be seen without penalty in the largest American cities? That is what has happened. The Commission's old rules were more restrictive with regard to signal importation the smaller the television market was that the cable system was in. Thus, in the largest markets, viewers were allowed to see a minimum of 3 independent signals; in the second 50 television markets—ranked by size according to the FCC—cable viewers were only allowed a maximum of 2 imported distant independent television signals; and in markets below the "top 100," they were allowed only 1 or, in some instances, no distant signal importation. The rationale behind those rules was that the smaller the market intuitively the more protection was needed. This proved, upon research, not to be true. Thus, the FCC eliminated its protectionist rules. However, the CRT has reimposed them. And the discrepancy between markets still exists. Thus, if you are a cable subscriber in a smaller television market, you could be forced to pay a penalty in order to see the exact same amount of programming that other cable subscribers, in New York let us say, get to watch without penalty.

CATA submits that this was not the intention of the drafters of the copyright law. We are seeking legislation that would correct that inequity and allow all viewers, regardless of where they are located, to see the same amount of programming that is presently allowable in the largest markets without penalty. We are attempting to design legislation that would simply apply the copyright laws equally to all American viewers. It takes the form of setting the FCC's old "top 59" distant signal market rules as the "floor" for the imposition of distant signal copyright penalty fees imposed by the CRT. That is, no system would have to pay the 3.75-percent penalty fee until it was already carrying a minimum of three distant independent television signals. That is what H.R. 2902 says today.

Now, in order to clarify that legislative proposal, and to make it match the old FCC rules identically, we are already discussing with Mr. Synar a modification of his bill that would say that if any system is in a market that already has one local independent signal, then only two imported signals would constitute the penalty threshold. This would have the result of standardizing the CRT

rule with the old FCC "top 50" rule and would assure that no segments of the American population were penalized unduly because of the intricacies of the imposition of the rules.

We believe that the copyright holders should have little objection to this equalizing legislation. In fact, it would not really impact on cable systems in all but the smallest markets, the markets that account for only marginal revenues for copyright holders. The broadcasters will have more problems with this approach, but not because of copyright concerns. It is important when you listen to the broadcasters to remember that in most cases their objection has to do not with the amount of payment, not the copyright fee itself, but the fact that cable systems are competing with broadcasters. They object to the introduction of competition, any competition. They like the rules the way they were because, in effect, the CRT has reimposed the old FCC protectionist doctrine. From a copyright point of view, the broadcasters, who get less than 5 percent of the copyright royalty pool, can have little justification for their stance. If they want protectionism renewed, they should go back to the FCC, or to the appropriate committees of Congress and seek it. They should not achieve that protection through the misuse of the copyright law and this subcommittee.

Indeed, CATA is seeking other copyright law modifications, in line with the request of the broadcasters that are legitimate copyright issues. As the broadcasters themselves have pointed out, the result of the complex application of the FCC's rules through the copyright law has been to deny carriage to local broadcasters in some instances within their own market area, or ADI, area of dominant influence. We are actively working with broadcast groups to correct that problem because, once again, it would be beneficial to American cable viewers to do so.

Rather than try to explain the intricacies of what we are trying to accomplish, I would ask the chairman's permission to submit for the record, as soon as it is off the presses, the relevant portion of our newsletter for this month which goes into detail on all of the issues I have addressed here.

Senator DECONCINI. We will be glad to accept it.

[The following article was subsequently received for the record:]

[From CATA Cable, March 1984]

COPYRIGHT! TRYING TO ACCOMPLISH THE POSSIBLE

There is a possibility that Congress will act this session on legislation to modify the 3.75 percent penalty fee imposed on cable systems by the Copyright Royalty Tribunal. You read that right—it's possible we could get a bill this year. This is not to say that it is going to be easy, or that we have much time to accomplish what lots of folks consider to be the "impossible," but we do have a shot at it and we are going to make an all-out effort to see that the industry gets some much-needed relief.

As usual, none of this is very easy to explain. It is important, however, for you to wade through it anyway because it may end up being up to the individual cable operators, contacting their representatives, which will make or break this effort later on.

Here is what has happened: As you will remember, there are several bills in Congress right now to deal with the overall inequities created by the Copyright Royalty Tribunal's decision to reimpose, economically, the FCC's distant signal restrictions. The Commission had eliminated those rules in 1980 because they found there was no reason for them—that broadcasters did not need the protection that the rules provided.

Once those regulations were eliminated, it triggered a provision of the Copyright rules that gave the power to the CRT to determine the appropriate Copyright rate that cable systems should pay for the signals they were now allowed to add to their systems. The CRT was charged with determining a "reasonable" rate under the provisions of the law. Instead, they decided to create a "marketplace" rate. That rate was 3.75 percent of the gross basic revenue for all added signals.

There were several problems with this approach. First, Congress, in the Copyright law, had never indicated it was trying to create a "marketplace" rate for cable carriage of broadcast signals. On the contrary, it created a formula that fell somewhere between no copyright liability, which is where we had started, and full liability. Suddenly the CRT has changed the intention of the law and is imposing full liability. Further, because the CRT could not apparently figure out its own mandate, it decided to simply mimick the discarded FCC rules in imposing the new fees. But that resulted in smaller television market audiences continuing to suffer under "second-class citizen" status because the fees were imposed disproportionately on the smaller market cable systems.

Why, it has been asked, did the FCC do that in the first place, and is there a good reason to continue this discrimination against viewers outside the major urban areas? The answers to those questions are simple. The FCC imposed the restrictions—limiting the number of distant television signals that a cable system could bring into a market based on market size—because they intuitively assumed that the smaller the market the less likely the local station would be able to succeed against competition.

Now there is a totally separate question of whether it was appropriate at all for the Commission to intentionally impose barriers to competition in order to protect broadcasters—but we need not fight that one because the Commission itself decided that the protectionist rules were based on erroneous assumptions and that the facts indicated they were not needed in the first place!

So the reason the Commission originally imposed the restrictions—a limit of three distant independent signals in the "top 50" markets (that was cut down to two if the market already had a local independent signal), two imported distant independent signals in the "second 50" markets, and one imported distant independent signal in all other television markets—was to protect broadcasters who proved not to need any federal protection.

THE ENTIRE THEORY PROVED WRONG

It's interesting to note that the whole theory of protectionism with regard to broadcast signals was really backwards. To begin with, there has never been any economic evidence that local broadcast stations need protection from competition. The whole bugaboo was created by the theory of "localism" which said that if there was too much imported television fare folks would not watch the local signals, and the local television station, losing its advertising base, would therefore not be able to produce local programs and, of course, the Commission saw its mandate as protecting and fostering "localism." Thus, the theory went, if you add competition you threaten the economic base necessary for "localism."

The entire theory proved wrong. To begin with, the local stations, regardless of how many distant signals were brought into the market by cable, could never show a significant economic impact on their revenues. If the local station was a good one people watched it, and advertisers paid to be on it regardless of how many imported signals there were on cable. Naturally, the entire premise falls even further once you realize that while the commission tried to restrict the importation of distant television signals, they encouraged the production and distribution of direct-to-cable programming.

Eventually people will begin to understand that the viewing audience doesn't really care who creates the programming—or how it is delivered for that matter—all they care about is watching the programming they want to see! Anyway, a lot of local broadcast stations began to realize just that. They were forced, by the introduction of competition from cable in the form of imported distant independent signals as well as other cable programming, to actually look at what the local advertisers would offer that would attract the local audience.

Lo and behold, they got a great idea—local programming! Especially local news! It was unique, it was fresh—and since no matter how many other signals are imported it is something local viewers want to watch, local advertisers pay a bundle for it! Local news has become the most competitive area for local television stations. That is exactly what the FCC wanted to happen—the fostering of local programming. But it did not come about by restricting competition—on the contrary.

The more competition, the more importation of distant signals, the more the local station is forced to stress its unique localism! The Commission, after years of study, finally realized all this, and eliminated the limitations on distant signal importation by cable systems. Systems all over the country added distant signals and the local broadcasters certainly did not go out of business.

THE PRICE WAS WELL OVER DOUBLE

Then, of course, came "Black Tuesday," the day the CRT rules went into effect, reimposing the old FCC rules by forcing anyone who had added signals to pay 3.75 percent of gross revenue for each such additional signal. On an average basic cable subscription fee of $10.00 per month that meant that the cable system had to pay almost $.50 per month per subscriber for each of those additional signals ($.38/mo. for copyright, and $.10/mo. for the delivery of the signal).

The price was well over double the cost of any other advertiser-supported cable programming. It should come as no surprise that cable systems all over the country began dropping the signals their subscribers had gotten used to and wanted to watch rather than continue to carry them at those outrageous fees. This is especially true since a lot of cities continue to impose rate regulation on cable television systems and they were unwilling to let cable rates go up to cover the unexpected added cost (that's one of the reasons why we also need Congress to pass H.R. 4103).

A GROSS INEQUITY AGAINST THE SMALLER TELEVISION MARKET SUBSCRIBERS

The unconscionable part about all this is that the fees were not imposed on the cable systems and subscribers equally. While we could go on for quite a while arguing that the CRT was mistaken in interpreting their mandate in the first instance—that they should not have sought to impose "marketplace" rates, and that even if they were correct in that aspect, the price they set was and is demonstrably too high (after all, if you don't have a willing buyer—the cable system—at the rate you set, then the rate is not a "marketplace" rate), we will not dwell on all that.

Those are issues for another day. What we are trying to correct now is the fact that in imposing the penalty fee the CRT chose, for no stated reason, to follow the FCC's discarded rules. The result was that smaller market and some "Second 50" market systems and subscribers have to pay the penalty fee before they are allowed to see the same amount of programming that the folks in the top markets enjoy without penalty!

Why should folks in "East Overshoe, Ks." be required to pay extra for programming that the folks in New York get at the normal, Congressionally mandated rate? The simple answers is that they shouldn't. The CRT made an error in the way it imposed the new fees and the result is that there is a gross inequity against the smaller television market subscribers around the country. H.R. 2902 (the Synar Bill) is designed to create equality in television viewing across the United States.

It is a bill that, once modified to reflect the latest thinking on this issue, would allow all television market cable systems to import the same number of distant independent television signals as those in the so-called "Top 50" markets. That is, the system could import three distant independent commercial television signals unless there was already one such signal in the market, in which case they could only import two more.

In cable shorthand this is known as the "Three-but-if-one-then-two" rule. All cable subscribers in the United States would thus be treated equally regardless of whether they lived in an urban center or a rural area. Put simply, it is fair.

H.R. 2902 IS DESIGNED TO CREATE EQUALITY IN TELEVISION

CATA maintains that the copyright holders, represented for the most part by the Motion Picture Association of America, should not have too many qualms about this proposal. Why? Because it really does not impact the larger television markets where the MPAA members make a vast percentage of their profits. Something like 80 to 90 percent of their profit in gross dollars comes from the top 25 television markets.

Those markets are not affected in any way by the modified Synar bill as explained here. That bill, insofar as the additional distant signals allowed to be carried without the 3.75 percent penalty is concerned, would primarily affect smaller markets and about 24 of the "Second 50." It would not hurt the MPAA members' pocketbooks in any significant fashion, and it would most certainly help cable operators and subscribers in the non-major-urban-market areas. That's still where most of the cable systems are today.

While we can't guarantee anything, we are hopeful that we can reach an agreement with the MPAA on this legislation. That is, we are at least trying to get them to say they will not actively oppose a modified bill. If an agreement is reached, there is every indication that quite a few more members of the Copyright Subcommittee in the House will join in supporting the bill. Also, such a change in attitude would be the catalyst for introduction of a companion bill in the Senate. Again, no promises—but we have a shot at it and we are working hard to accomplish that result for the industry. The NCTA, by the way, has already stated its support for the original bills and is being kept well-informed of our progress.

Is this legislation all we are seeking in the way of copyright reform? Of course not. There are still some underlying problems that must be dealt with by Congress. The whole question of the mandate and the standards for the CRT, for instance, and the appropriate treatment for tiered broadcast signal carriage need to be addressed. But they will not be dealt with this session of Congress. That would be a totally unrealistic expectation. We are attempting to accomplish the possible. Seeking anything more would simply accomplish nothing.

Even if we get an agreement with the MPAA, would that guarantee success? No, not really. But it would go one heck of a long way in that direction. We could still expect opposition from the broadcasters even though another part of the proposed modified bill would give them some relief they have asked for—we'll get to that in a minute. Their opposition, as usual, would have nothing really to do with copyright law, or even be relevant to the jurisdiction of the Copyright Subcommittee, but they can be expected to raise it anyway.

You see, the broadcasters don't like competition. They still believe that, even though they can't show any numbers to prove it, the more distant signals we import the more difficult it is to maintain their monopoly on the local viewing public (actually, that's true—we are finally making them work for their audience—but all indications are that when they do, they still get the audience!).

Copyright law, especially when it is imposed on a basis that effectively forces cable operators to delete distant independent signals, is a convenient way for broadcasters to maintain their audience monopoly without having to work for it. They like the unequal imposition of the CRT penalty fee. They really don't get a significant portion of the copyright royalties in any event, but they don't view this from the copyright aspect. They simply want to keep the competition out.

They like the reimposition of the protectionism that the FCC eliminated in 1980. The response to that argument is simple: If you want the reimposition of protectionism, go to the FCC or to the correct committees of Congress (Mr. Wirth's Telecommunications Subcommittee in the House, for instance)—it is not appropriate for the Copyright Law to be used for policy purposes other than copyright!

Finally, we can expect the sports folks to object to just about anything and everything. Again, this has precious little to do with copyright fees for broadcast programming. If the sports folks have their way there will be little, if any, sports left on broadcast television for cable to carry—they want to put everything on a premium basis and force us to sell it to our subscribers on a "pay" channel. Frankly, we could probably make more money doing it that way, but we think cable subscribers should have the opportunity to watch sporting events on "Basic," without having to pay extra. H.R. 2902 would equalize the ability of all cable subscribers, wherever situated, to see sporting events on imported distant television broadcast signals.

"WE TOLD YOU THIS WAS GOING TO BE LONG-WINDED . . . IT IS SO COMPLICATED . . ."

Now, what was it we said earlier about "giving something to the broadcasters" in this bill? Well, it was their idea, and they presented it in testimony a couple of weeks ago. It seems that some of the independent television stations around the country have finally wised up to the fact that cable television carriage actually helps them. And they want to be carried. This is particularly true of the new UHF independents that are springing up. They are presently at a disadvantage because the copyright rules, and especially the CRT's 3.75 percent decision, track the old FCC rules. Those rules defined what a "local signal" was in 1982. In essence, a television station was and is considered "local" for the purposes of copyright if the cable system is either (1) within the "35-mile zone" of the station, (2) within the station's "Grade B" signal contour, or (3) in a county whose residents "significantly viewed" that signal according to FCC measurements in 1972.

Now that is all well and good except that for the purposes of advertising sales, television stations throughout the United States use a different measurement. They use something called the "ADI"—the Area of Dominant Influence (or the Nielson equivalent "Dominant Market Area" [DMA]). ADI's are determined by a complicat-

ed formula calculated by Arbitron. Almost all counties in the United States are assigned to one ADI, and one only. That is, the country residents are either considered the natural audience area for one market or another (Washington, D.C. or Richmond, Va., for instance), but never both.

Now the problem comes that there are some ADI areas that are not within the "local" definition used for copyright. Thus, there are some stations that, for copyright purposes, must be considered "distant" by a cable system that is actually within the ADI of that broadcaster! Naturally they don't like that.

The reason is simple. If the cable operator is forced to pay 3.75 percent for that distant signal, as we pointed out before, it is unlikely that he will carry the signal—it is too expensive, particularly for a new UHF independent. The operator may want to carry the signal, but the economics are prohibitive. The broadcasters understand that and want to change the rules to say that For Copyright Purposes Only a cable system may consider any broadcast station as local if the cable system is within that station's ADI. This would mean we would not have to pay the 3.75 percent penalty for those stations and it is likely that we would then carry them, which is what they want.

Now we have to stress that this "ADI modification" is for copyright purposes only. It has nothing to do with the "must carry" rules, and these signals would not then be considered "must carry" stations. The entire "must carry" issue is not a copyright issue and has no bearing on copyright law.

We told you this was going to be long-winded, but it is so complicated that there really is no other way to explain it to you. We are now fully up to date on H.R. 2902, and what is happening in the negotiations to modify it, and try to achieve some agreement with the MPAA and give some relief to the broadcasters. All we can say is stay tuned on this one. If an agreement is reached and the bills start to move in the House and the Senate, you can bet we will be urgently seeking your active participation.

What, you might ask, has happened with the other copyright measure—H.R. 3419 in the House, and S. 1270 in the Senate? These are the bills that would create a new category of "national cable broadcast network" and eliminate that category from those which trigger the 3.75 percent penalty fee. To be honest, those bills are getting a bum rap at the moment, and we are trying to correct that. CATA, as you know, fully supports those bills as well.

The problem is that since, at the moment, WTBS is the only station that would qualify for the new category, the bills are being maligned by being called "private interest" legislation for Ted Turner. That's neither true nor fair. To begin with, Turner should not be penalized for the fact that he is the only one so far to have the guts to go out and publicly work for national coverage of his station. He also pays the copyright holders based on that acknowledged national audience, and he gets advertising fees commensurate with that audience. It is for those reasons that the bill makes so much sense. Why should cable operators have to pay a special fee to the copyright holders for the importation of a signal whose owner has already paid them based on the fact that the signal is being imported by cable systems?

The new category is logical, and is the first step toward acknowledging that a new marketplace is slowly evolving centered on distant signal carriage. As broadcasters other than Turner evolve toward that marketplace, they too would qualify. But none other than Turner does now—and that is not his fault. Further, the cable industry gains a lot more from this bill than Turner does. After all, WTBS is already seen in almost 82 percent of all cable homes. Turner gets a maximum increase of 18 percent of the subscribers while the other 82 percent get the right to see an additional distant signal without the penalty fee other than WTBS!

The cable subscriber would be the ultimate winner in this one, and that is the message we must send to Congress. If we don't, we fear there will be very tough sledding for these bills because those who oppose them have an easy time "smearing" them with the "special interest" label. Again, we are working hard to correct that erroneous image and you can certainly help! It is in the interest of every cable operator to do so!

Mr. EFFROS. In closing, I would like to reiterate that what is being asked of this subcommittee and Congress as a whole in the area of cable/copyright this year is not as difficult or confusing as it may at first blush appear. The bill now before you, and another one that we expect to see introduced shortly, are simply minor adjustments to a law that may in fact need major changes in the near future. They are "bandaids" to aid in healing the wounds caused

by the CRT's rate increase decision, and they do not address the core issues at all.

In S. 1270, there is a simple effort to say that cable subscribers should not have to pay a second time for programming if that programming has already been paid for at marketplace rates. Where such payment can be shown, the Government should simply step back and let the marketplace control. In our other copyright effort, we are only trying to equalize the rights of all subscribers nationwide. Rural America should not be penalized because the CRT did not appreciate the intricacies of the rules they were imposing on the cable industry.

I am sure that next year we will be back to you seeking redress for such things as the present practice of the Copyright Office to insist that the law requires them to collect fees for signals that are not and cannot be viewed by subscribers. For requirements that we pay copyright fees for the entire subscriber base when only a definable portion of the base can get the signal in question, or the entire underlying issue of the penalty fees, and how much they should be to begin with. For now, however, the requests are simple and, more important, they are accomplishable.

Again thank you for your invitation to appear before you. I would like to answer any questions.

Senator DECONCINI. Thank you, Mr. Effros. I appreciate your testimony. You raised some very important points.

My office and many of my colleagues' offices have received much mail from angry cable TV subscribers since the CRT decision. In many instances, these people signed up for certain cable television channels and enjoyed them for years only to find that some obscure Government agency, the Copyright Royalty Tribunal, had priced these channels right off their cable TV sets. I also understand that there were quite a few instances where city councils were very upset with their cable companies when, because of the CRT decision, the cable company was forced to either drop very popular programming or ask for substantial rate hikes.

I intend for the primary beneficiaries of cable copyright legislation to be the viewing public. That is the reason I introduced this legislation and the reason we are holding the hearings today.

I would like to ask you, Mr. Effros, what effect did the CRT decision have on the cable systems which you represent?

Mr. EFFROS. Larger cable systems throughout the United States were forced to drop signals. The analysis that we have seen would indicate that approximately 10 million homes had the potential and did, in fact, lose some signals.

Now, it is very important to recognize that in a lot of cases this directly relates to your own question to Mr. Turner about the fragmentation of local programming. It was the local or the regional independent stations which were the ones that lost carriage just as much as the superstations lost carriage. In other words, because the old FCC rule said that most smaller market cable systems could only import just one distant signal and then, in 1980, those rules were eliminated and they started importing three or four distant signals as was allowed in the larger markets, and then the CRT came in and said you are going to have to pay 3.75 percent of your gross revenues for each of those signals, they then were forced

to drop them. So people were just getting used to seeing local independent news for the first time.

Senator DECONCINI. And then they had to drop it?

Mr. EFFROS. And then they had to drop it.

Senator DECONCINI. So the viewing public suffered by that?

Mr. EFFROS. Absolutely.

Senator DECONCINI. No question in your mind.

Mr. EFFROS. Absolutely. And particularly local listeners.

Senator DECONCINI. It is my understanding that your membership is made up of many independent small cable TV systems serving smaller communities; is that correct?

Mr. EFFROS. We have membership now across the board, but we do represent the independent operators throughout the United States, yes, sir.

Senator DECONCINI. Are the majority of the independent operators small cable system owners?

Mr. EFFROS. Yes, they are.

Senator DECONCINI. It seems to be that some of the largest cable TV systems, in terms of subscribers affected by the CRT decision, are in the smaller communities where cable TV grew up and where it is almost a necessity.

Would S. 1270 benefit these communities substantially now and perhaps more in the future as more superstations develop?

Mr. EFFROS. Certainly it would, and the reason is simple.

As you point out, where cable grew up first was where there were no television signals or there were very few television signals. The result was that if you lived in a community that only had one television station, you are precisely in the community that is restricted the way the CRT has written its rules to importing only one distant independent signal. If you are in New York City, all of this is somewhat meaningless, although from the point of view of S. 1270, there is a different aspect to it, and that is the marketplace rates for the purchase of programming.

We are looking at this in two different directions. One is to correct the inequity of a station, such as Mr. Turner's paying marketplace rates, and then the cable operator having to pay them again.

On the other side of the coin, we are looking at the inequity of simply the mechanics of the way the CRT instituted its rule resulting in a continuing inequity that was created by the FCC in its old protectionist rules.

The broadcasters argued for that protectionism. That has nothing to do with copyright. It is irrelevant to this committee. I am sure the broadcasters will be heard to argue about reluctance of being a superstation or the compulsory license in general. And those are very interesting arguments and we can have them some other time; but, once again, they are not relevant to S. 1270 or any other legislation that you are looking at or being asked to consider this year.

Senator DECONCINI. The broadcasters will have an opportunity at our next hearing to present their views.

Thank you very much, Mr. Effros. I appreciate your testimony.

Our next witness is Shane O'Neil, president, RKO General, Inc.

Mr. O'Neil, thank you very much for you and your colleagues taking the time to be with us today. This is an area that requires

imput from as many people as possible. We know you are very busy and you have many things on your agenda so I want to thank you for taking the time to work with our staff and be here today.

STATEMENT OF SHANE O'NEIL, PRESIDENT, RKO GENERAL, INC., ACCOMPANIED BY PAT A. SERVODIDIO, PRESIDENT, RKO TELEVISION

Mr. O'NEIL. Thank you for inviting us to appear today. We welcome the opportunity to present our views on S. 1270. With me today is Pat Servodidio, who is president of RKO Television.

It seems particularly appropriate at this time for RKO General, Inc., to appear before you to speak on the goals and achievements of its station WOR-TV, which has been referred to by others as a superstation. Only last week, the U.S. Court of Appeals for the District of Columbia Circuit unanimously upheld the opinion and orders of the Federal Communications Commission reallocating WOR-TV, channel 9, from New York, NY, to Secaucus, NJ, and granting RKO a 5-year license for WOR-TV.

In view of the nature of the proposed legislation before this subcommittee which, in essence, creates a new station classification, "the national cable broadcast network," we think it important to quote the portion of the FCC's opinion licensing channel 9 to Secaucus, which establishes a special obligation to serve the areas of northern New Jersey within the station's coverage area. The full text of the Commission's ordering paragraph is included in my prepared statement. I will not read it.

Senator DECONCINI. We will put it in the record without objection.

[The following statement was received for the record:]

PREPARED STATEMENT OF SHANE O'NEIL

Thank you for inviting us to appear today. We welcome the opportunity to present our views on S. 1270. My name is Shane O'Neil, President of RKO General, Inc. With me today is Pat A. Servodidio, President of RKO Television.

It seems particularly appropriate at this time for RKO General, Inc., to appear before you to speak on the goals and achievements of its station WOR-TV, which has been referred to by others as a "superstation". Only last week, the United States Court of Appeals for the District of Columbia Circuit unanimously upheld the opinion and orders of the Federal Communications Commission reallocating WOR-TV Channel 9 from New York, New York, to Secaucus, New Jersey and granting RKO a five-year license for WOR-TV.

The FCC orders were issued in accordance with legislation introduced by Senator Bill Bradley and supported by the members of the New Jersey Congressional Delegation. The bill was enacted on September 3, 1982. Immediately afterwards RKO notified the Commission that it agreed to the reallocation of Channel 9 to Secaucus.

In view of the nature of the proposed legislation before this Subcommittee, which in essence creates a new station classification, "the national cable broadcast network", we think it important to quote the portion of the FCC's opinion licensing Channel 9 to Secaucus:

> Considering RKO's statements with regard to its programming expectations in conjunction with the clear Congressional intent, we anticipate that RKO's continued use of VHF Channel 9 will be directed toward satisfying the programming needs of its New Jersey Grade B coverage area. In the usual case, Secaucus, the city of assignment, would be the primary focus of the licensee's programming responsibilities. However, we have previously determined that the lack of

> local VHF television service to this highly populated area of northern New Jersey presented a unique set of circumstances. . . Accordingly, we expect RKO to perform a higher degree of service to its Grade B coverage area than is normally required of a broadcast licensee. At renewal time RKO will be judged by how it has met the obligation to serve the greater service needs of Northern New Jersey, which we view as broader than the specific needs of Secaucus.

In the short time since the FCC issued this order, we have accomplished much. In the field of programming, among other firsts which we have initiated is the first eight o'clock prime time news broadcast in our market which has been widely accepted for its quality and content by our viewers. Particular attention has been given to the problems, needs and interests of northern New Jersey in the course of these news broadcasts as well as in the station's other news, public affairs and informational programming. Moreover, even before the court's affirming decision we optioned property in Secaucus, New Jersey to serve as a site for what we propose as a first-class television studio. Now that the court has affirmed the Commission's decision, we are proceeding with the construction of studio facilities despite the possibility that those who had initially sought RKO's license to operate WOR-TV may attempt further legal action.

We call your attention to the nature of our New Jersey commitment in the context of the discussion of legislation which proposes to establish a class of broadcast stations to be known as "national cable broadcast networks" in order to highlight the emphasis which we place on our local service commitment -- a commitment which is one which we believe should take absolute precedence in our programming operations. We have taken steps to serve the people of New Jersey and we are pleased that our programming has been accepted by New Jersey residents as matters of acclaim. We intend to continue this focus on the affairs of the State.

The relief proposed by the legislation before this Subcom-

mittee, in effect eliminating the Copyright Tribunal's 3.75% royalty fee paid by larger cable television systems for retransmitting a so-called "national cable broadcast network", would not in its present form apply to WOR-TV. While we are gratified by the prestige we have in our market from the national acceptance of our programming, we have taken no action soliciting or otherwise encouraging cable operators to seek the right to carry our signal; in terms of the proposed legislation, we do not "promote such carriage". Any advertising which you may have seen which promotes WOR-TV as a superstation is not ours. Ironically, WOR-TV became a superstation through no act of its own. The signal of WOR-TV is received off-the-air by Eastern Microwave, (a satellite common-carrier totally unrelated to RKO or WOR-TV) and retransmitted via its facilities to cable systems across the country. No fees of any kind are paid to WOR-TV by Eastern Microwave.

Similarly, "the station's commercial practices and rates" do not "seek to compensate the station for its national audience" as required by S. 1270. Our rates are based on the market cost-per-point of the local market in which we operate. Finally, we negotiate with copyright owners and syndicators of programming as a local station. Thus, the legislation which is before you would not, if enacted, apply to us, and we wish to make it known to the members of the Subcommittee that we have no intention to take steps to avail ourselves of the relief which this legislation proposes.

In sum, we are proud to be New Jersey's commercial VHF station and to be citizens of New Jersey. We are proud also that our programming is accepted by millions outside of New Jersey. As a broadcaster with television stations in Los Angeles and Memphis and radio stations in eight major markets, we intend to continue to do the best job we can to meet our primary obligation which is to serve the viewers and listeners in the communities in which we operate.

Mr. O'NEIL. In the short time since the FCC issued this order, we have accomplished pretty much. In the field of programming, among other firsts which we have initiated is the first 8 o'clock prime time news broadcast in our market, which has been widely accepted for its quality and content by our viewers. Particular attention has been given to the problems, needs, and interests of northern New Jersey in the course of these news broadcasts as well as in the station's other news, public affairs, and informational programming.

We call your attention to the nature of our New Jersey commitment in the context of the discussion of this legislation which proposes to establish a class of broadcast stations to be known as "national cable broadcast networks" in order to highlight the emphasis which we place on our local service commitment—a commitment which is one which we believe should take absolute precedence in our programming operations. We have taken steps to serve the people of New Jersey and we are pleased that our programming has been acclaimed by New Jersey residents, and we intend to continue this focus on the affairs of that State.

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In sum, we are proud to be New Jersey's commercial VHF station and to be citizens of New Jersey. We are also proud that our programming is accepted by millions outside of New Jersey. As a broadcaster with television stations in Los Angeles and Memphis, and radio stations in eight major markets, we intend to continue to do the best job we can to meet our primary obligation which is to serve the viewers and listeners in the communities in which we operate.

Senator DECONCINI. Thank you very much, Mr. O'Neil.

WOR as well as WGN are known as reluctant superstations, at least when it is referred to in the Wall Street Journal, the New York Times, and other articles that I read.

As I understand the use of this term, it means that although WOR is carried by cable systems all over the country, it does not promote itself as a cable superstation, is that fair?

Mr. O'NEIL. That is correct.

Senator DECONCINI. How does your status as a reluctant superstation affect your purchasing and marketing practices?

Mr. O'NEIL. Why do I not let Pat explain that.

Mr. SERVODIDIO. Sir, we maintain one price structure. We price, as Mr. O'Neil said in the statement, we price for our local market—to use the industry term—cost per point or cost per thousand in our local market. We do not establish a two-station—a two-market rate, for example.

Senator DECONCINI. Do you carry national companies' advertising?

Mr. SERVODIDIO. Yes, sir.

Senator DECONCINI. But only for local broadcasting?

Mr. SERVODIDIO. Only for local.

Senator DECONCINI. That is what you are really after?

Mr. SERVODIDIO. Yes, sir. Just as the other stations are.

Senator DECONCINI. Does this mean that a local company, even though they can be seen outside your market, gets a lower rate than they might otherwise get, if you had a two-tier system where you were going to a national market outside your market versus a local inside market?

Mr. SERVODIDIO. Well, what we look at is really a one-flat-rate situation. We do not work a tier-rate card, for example.

Now, if an advertiser looks at us as an attractive buy, because of our coverage, that would be their decision. But we would use a local rate, be it for a local department store or an advertised product that is available outside.

Senator DECONCINI. Can you share with us what you think may be the percentage mix of these national and local companies on WOR?

Mr. SERVODIDIO. The percent figure would be very difficult. I could get back with an exact——

Senator DECONCINI. Well, that is all right.

Mr. SERVODIDIO. I think the bulk of our business comes from our agencies which handle both local and national. I think the mix relates just to your own individual marketplace. We carry probably about 20 or 25 percent which is truly local, be it a mom and pop setup. The remainder would be national advertisers.

Senator DECONCINI. Have you studied or are you aware of the effects of the CRT rate increase on a number of cable systems carrying WOR across the country?

Mr. SERVODIDIO. We have not studied it. There are certain generic information that is available to us, be it, for example, even in the trades or be it as a subscriber to NTI, which is Neilsen, one of our surveys, but we can get information on that basis, whether it is generic, not by day part, not by program.

Senator DECONCINI. You do not know how much you lost?

Mr. SERVODIDIO. No, sir. We do not keep any track of it.

Senator DECONCINI. Was it disturbing to you that you had some loss? Was that significant to your operation?

Mr. SERVODIDIO. No, it does not reflect in our profit, it does not reflect in our sales effort. It just did not come into our pricing system.

Senator DECONCINI. Mr. Valenti has testified that his members have chosen not to sell Turner Broadcasting's recently syndicated programming like "M-A-S-H."

Has WTBS not created a sort of a subset of the syndication market consisting of programming which has had a life on network TV and a second life on local broadcasting stations?

Mr. O'NEIL. I think that is a pretty good way to describe it; yes, that is true.

Senator DECONCINI. Can you tell us how WTBS programming is directly competitive and, by that, I mean consisting of the same programming as WOR?

Mr. SERVODIDIO. I do not see them as directly competitive. WTBS comes into our marketplace on cable, a certain amount of cable systems, but I do not see it as a direct competitor. There is a fragmentation in our marketplace because of the proliferation of stations, proliferation of media, and that is just one of them.

Senator DECONCINI. So it is not your objection to become a superstation, is that correct?

Mr. SERVODIDIO. Not at all, sir. It is a corporate—within our broadcast division and television division, it is a policy of ours and direction for localism. We honestly are approaching it, and we look at the fragmentation of media and the proliferation of media and the stations in Los Angeles, so I am reflecting thoughts for Los Angeles and Memphis where localism will win out. I honestly feel that the station that truly serves the local market, no matter what distant signal may come in, that station should be a winner in its marketplace.

Senator DECONCINI. Hypothetically, if S. 1270 were enacted into law, do you think that WOR would apply for a classification as a national cable broadcast network?

Mr. O'NEIL. No; we would not. I mentioned that in the statement.

Senator DECONCINI. Passage of the legislation would not change your objectives of what you want to achieve with this station. You are really committed to local broadcasting only?

Mr. O'NEIL. We are really locally oriented.

Senator DECONCINI. I believe, of course, that S. 1270 will benefit the TV viewing public, the cable operators, the copyright owners and, quite frankly, many broadcasters.

In view of the fact that the opponents of this bill are sure that it will result in stations like WOR becoming a national cable broadcast network out of their own economic self-interests, why do you think that they are against this?

Mr. O'NEIL. That who is against this?

Senator DECONCINI. That broadcasters are against this. I do not see how this is hurting them. Of course, I will save that question for them too, but I just wondered if you could comment on why you feel the broadcasters fear the bill. Is it just a fear of more competi-

tion. Is that really the only reason that they can be against this, or am I missing something?

Mr. O'NEIL. It could be. It may be that certainly the networks consider Mr. Turner's station, WTBS, to be a lot more competition than they feel they could handle.

Senators DECONCINI. More than yours?

Mr. O'NEIL. But we are different because we are certainly local. So we concern ourselves with the local competition in New York, Los Angeles, and Memphis.

Senator DECONCINI. Do you attribute any of your station's success to its carriage on cable systems? Is that important?

Mr. O'NEIL. No. It is a prestige item. It is nice, for example—I mean it is very flattering to be known as a superstation, but it does not really affect us in any way.

As a matter of fact, we will occasionally see advertising that says WOR is a superstation, and we would say, oh, that is interesting. We do not even know about it.

Senator DECONCINI. Very good. Well, thank you very much, Mr. O'Neil. We appreciate your time today. It has been very helpful.

These hearings will be recessed, subject to the call of the chairman. We hope to have another day of the hearings in the next few weeks.

Thank you very much everyone for testifying.

[Whereupon, at 11:04 a.m., the subcommittee adjourned, subject to the call of the Chair.]

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